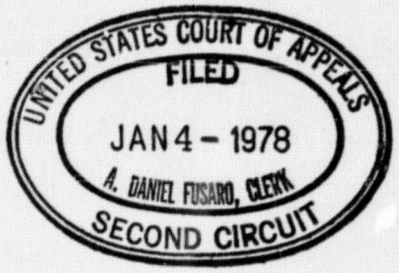
United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

76-7414

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



BRUNSWICK CORPORATION & SHERWOOD MEDICAL INDUSTRIES, INC.,

Plaintiffs & Counter-Defendants-Appellees,

v.

DAVID S. SHERIDAN & NATIONAL CATHETFR CORPORATION,

Defendants-Counter-Claimants-Appellants.

Docket No. 76-7414

B P/S

BRIEF OF APPELLEES ON THE QUESTION OF JURISDICTION

This brief is submitted in response to the Court's direction to file, by January 5, 1978, a brief on the question whether the Court has jurisdiction over this appeal on the antitrust counterclaim in light of defendants' suggested construction of the 1971 settlement agreement.*/

As the Court knows, this appeal is before the Court pursuant to an order under Rule 54(b) of the Federal Rules of Civil Procedure, making final the dismissal of Count

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*/ The question of jurisdiction has already been raised by our motion of January 4, 1977 to dismiss the instant appeal on the ground that certain of the necessary elements of Rule 54(b) were not present here. The motion preceded the filing of any briefs, and it was denied at that time.

I*/ of a multi-count counterclaim at the conclusion of all evidence in a trial involving the counterclaim and a single count complaint. The complaint and Count II of the counterclaim are awaiting retrial before the District Court, the jury having been unable to agree on a verdict; meanwhile, defendants filed this appeal seeking reversal of the order dismissing Count I of the counterclaim, which alleged violations of Sections 1 and 2 of the Sherman Act.

The complaint seeks damages for defendants' breach of a May, 1971 "settlement agreement" between plaintiffs and defendants, which imposed certain restrictions upon defendants in connection with the sale of medical tubing. The extent to which defendants are restricted by the terms of that settlement agreement is in dispute in the portion of the case that will be retried: Plaintiffs claim that the agreement prevented defendants from selling a certain type of tubing and defendants claim to the contrary. Until this issue is decided by a court or jury, the interpretation of the settlement agreement is still open -- despite the unlikely possibility that defendants can sustain their illogical and strained interpretation of the agreement.

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*/ The court below also dismissed Counts III and IV of the counterclaim, but we do not address those counts because the appeal as to them has been abandoned.

The briefs filed by the respective parties show that a disagreement exists over the questions presented for review.

Our brief, on behalf of plaintiffs, analyzes the evidence of plaintiffs' conduct and the absence of any anti-competitive impact on defendants, pointing out that defendants made no showing that plaintiffs had violated either Section 1 or Section 2 of the Sherman Act (Brief For Appellees, Sections I and II). Stated differently, plaintiffs' position is that whatever the Court may later decide as to the terms of the settlement agreement, the defendants presented no evidence of conspiracy, combination or monopoly that constituted a violation of the antitrust laws or that defendants were in any way restrained -- defendants were not impeded in their trade or business by reason of the settlement agreement because they acted under their own interpretation and refused to conform their conduct to plaintiffs' interpretation. If our formulation of the issues now presented for review is correct, then this appeal can be disposed of without deciding whether the terms of the settlement agreement should be interpreted as defendants suggest.

Defendants apparently take a different view of the issues presented here, for in their briefs they rely upon

the settlement agreement itself and urge that a determination of how it shall be construed is required now.*/ Defendants argue as follows at page 5 of their reply brief:

> ". . .The evidence below makes out not one but two independent grounds for satisfying the 'contract, combination or conspiracy' requirement of Section 1. First, the non-compete provision contained in the 1971 settlement agreement was unquestionably a contract in restraint of trade. Second, the concerted efforts of Brunswick and Sherwood to bar Sheridan and National Catheter from the conductive line tubing market clearly constituted a combination in restraint of trade."

At page 7 of their reply brief, appellants rely upon their counsel's argument to the District Court as follows:

> "There certainly was a contract. A contact attempting to impose a restriction on Sheridan and National Catheter."

Defendants are inconsistent in their approach, as they rely upon the settlement agreement itself as a basis for relief under their antitrust counterclaim but urge their own construction of the agreement, which, of course, avoids the antitrust problems that they seek to raise. At page 13 of the Brief For Appellants, defendants argue:

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*/ Although we do not agree with our opponents' formulation of the issues presented for review, we nonetheless addressed those issues in Sections III and IV of our brief, with the caveat (p. 30) that in our view such issues were not necessary to the disposition of this appeal.

> "It should be noted that the 1971 settlement agreement is susceptible of a more reasonable interpretation. . . . Properly construed, the agreement would not prevent National Catheter [Appellant] from marketing its superior product." (Fn. 11)

Thus, while apparently relying upon the settlement agreement as a basis for substantive antitrust relief defendants at the same time suggest a construction of that settlement agreement which would obviate the need to scrutinize it under the antitrust laws. We can safely predict that defendants will continue to urge this interpretation upon the District Court when retrial commences and the meaning and application of the settlement agreement is litigated in plaintiffs' contract damage claim under the complaint. If the District Court should agree with defendants' interpretation, the question that defendants now ask this Court to consider -- whether the settlement agreement itself is an unreasonable restraint of trade -- will never have to be decided here.

One of the grounds of our January 4, 1977 motion to dismiss the appeal was that an appeal from the disposition from fewer than all of the claims should not be permitted when the Court of Appeals might be called upon to consider both adjudicated and unadjudicated claims, Luckenbach Steamship

Co. v. H. Muehlstein & Co., 280 F.2d 755, 759 (2d Cir. 1960); Arlinghaus v. Ritenour, 543 F.2d 461, 464 (2d Cir. 1976). At the time we filed our motion we did not have the benefit of defendants' briefs, so that it was not possible for us to point out the precise areas of overlap between adjudicated and unadjudicated claims. Now that defendants ask this Court to consider their own interpretation of the settlement agreement in connection with the instant appeal, the overlap becomes obvious: The meaning of the settlement agreement is a primary issue in the unadjudicated contract claims but (in defendants' view) is part and parcel of their appeal.

Thus, although we disagree with defendants' formulation of the issues in this appeal, to the extent that defendants base their claim upon the settlement agreement itself -- which they clearly do -- an adjudication of their claim at this time would be inappropriate because the meaning of the settlement agreement has yet to be determined.

CONCLUSION

In our own view, the record below amply supports Judge Foley's ruling that defendants failed to present evidence that Brunswick and Sherwood had done anything to defendants in violation of the antitrust laws. We

therefore believe that the instant appeal can be disposed of now without dealing with unadjudicated questions that could render issues here moot. But the issues as defendants perceive them -- the construction of the settlement agreement and its status as a basis for an antitrust damage claim -- appear to overlap considerably with questions still before the District Court. If this Court believes that defendants' issues require consideration of unadjudicated matters along with adjudicated matters, the better alternative may be to dismiss the appeal with leave to reinstate it following a complete disposition of the entire case before the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 4, 1978, he served a copy of the foregoing Brief Of Appellees On The Question Of Jurisdiction by mailing same, with postage fully prepaid, to:

Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attention: John P. Arness, Esq.

Watson B. Tucker

SUBSCRIBED AND SWORN to before me this 3rd day of January, 1978.

Mary Krystalski
Notary Public